Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

(3)

No. 91-75

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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1. By utterly ignoring the most salient fact in this case—that the parties contractually *agreed* that the arbitrator would have the authority to make a "final and binding" decision regarding arbitrability—Respondent attempts to harmonize the decision in this case with the Third Circuit's decision in *Pennsylvania Power Co. v. Local 272, IBEW*, 886 F.2d 46 (3rd Cir. 1989). In *Pennsylvania Power* the question was whether waiver of rights exists if a party allows an arbitrator to consider the question of arbitrability, while formally noting its objec-

tions to such a determination. The court there concluded that there had been no waiver of judicial review and accordingly undertook a more rigorous review of the arbitrator's decision than it would otherwise have done. *Cf., GK Mgt. v. Hotel Employees Local 274*, 930 F.2d 301 (3d Cir. 1991) (distinguishing *Pennsylvania Power* on the basis of the waiver issue and noting the "severely limited scope . . . of review" where waiver is not at issue). Where, as here, the parties have agreed that the arbitrator's decision on arbitrability would be "final and binding," the parties have unquestionably placed judicial review of an arbitrator's decision on arbitrability on the same footing as review of an arbitrator's decision on the merits of an arbitrable grievance.[1]

2. Respondent's effort (Br. Opp. at 6 n.2) to distinguish the Seventh Circuit's decision in *Jones Dairy Farm v. Local P-1236*, 760 F.2d 173, *cert. denied*, 747 U.S. 845 (1985), on the basis that "[t]he Postal Service did not waive its jurisdictional objection here" is similarly disingenuous in light of the parties' contract language making the determination of the arbitrator on the question of arbitarability "final and binding." Moreover, contrary to respondent's suggestion, it is clear from the *Jones Dairy* decision that the rule in the Seventh Circuit is that where, as here, a party "voluntarily and unreservedly submits an issue to arbitration, he cannot later argue that the arbitrator had no authority to resolve it." *Jones Dairy, supra*, 760 F.2d at 175. The Fifth Circuit did exactly the contrary here, accepting Respondent's argument that the arbitrator had no authority "ever to reach the issue of arbitarbility." Pet. App. 8a.

3. The question left open by this Court's decision in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), is the appropriate standard of judicial re-

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[1] As noted in the Petition (Pet. 2-3), the parties' contract actually provides a *narrower* scope of review for an arbitrator's arbitrability decision than for a merits decision.

view where the parties have "clearly and unmistakably" agreed to give the arbitrator the authority to decide the issue of arbitrability. Pet. 10-11.

Except for the Fifth Circuit, every court of appeals that has addressed the question has concluded that in such circumstances judicial review is severely limited. *E.g.*, *GK Mgt. v. Hotel Employees Local 274*, 930 F.2d 301, 304-305 (3d Cir. 1991). Pet. 11-14. Except under the Fifth Circuit rule, an arbitrator who resolves an issue of arbitrability pursuant to the submission of the parties may make his own interpretation of the contract without being second guessed by a reviewing court applying what it deems a more appropriate canon of contract construction.

The Fifth Circuit, by contrast, refuses to defer to an arbitrator's determination which the court deems to be outside the arbitrator's authority based on the *court's de novo* interpretation of the labor agreement. *See Delta Queen Steamboat Co. v. District 2, Marine Engineers Beneficial Ass'n*, 889 F.2d 559 (5th Cir. 1989), *cert. denied*, 111 U.S. 148 (1990); *Container Products, Inc. v. United Steelworkers*, 873 F.2d 818 (5th Cir. 1989).

4. Respondent attempts to distinguish *Berklee College of Music v. Berklee Chapter of Mass. Federation of Teachers, Local 4412*, 858 F.2d 31, 34 (1st Cir. 1988), *cert. denied*, 110 S.Ct. 53 (1989) are futile. There, the district court had found "the contractual language clear," and had set aside the arbitrator's award as the lower court did in this case. The Court of Appeals in *Berklee*, however, "taking the Supreme Court at its word," reversed the district court and upheld the arbitrator's decision. As the dissenting judge stated in that case, one would be "hard put to see how the language of the contract [in *Berklee*] could be more *un*ambiguous." 858 F.2d at 35 (emphasis in original). The First Circuit nevertheless concluded that since the arbitrator's finding of

arbitarbility was a "plausible" reading of the contract, albeit not the only one, the strict deference standard mandated enforcement of the arbitration award. Thus, under *Misco*, the court's review was properly:

> . . . confined to ascertaining whether the party seeking arbitration is making a claim on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

484 U.S. at 37 (quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-568 (1960).

5. Respondent adopts a myopic view of the Fifth Circuit decision in this case, contending that "this case does not squarely present any issue with respect to the appropriate degree of deference." Br. Opp. 8. But respondent's recitation from the decision of the court below omits the court's own acknowledgement of its conflict with other circuits. Thus, while the court may have paid lip service to *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), it went on to explain why the Fifth Circuit will *not* apply *Misco* to an arbitrator's determination of the scope of his authority (Pet. at 4.a):

> *But this court* will not enforce an arbitrator's decision on the merits if the arbitrtaor has exceeded his authority under the collective bargaining agreement. *Delta Queen Steamboat Co. v. District 2 Machine Engineers Beneficial Ass'n*, 889 F.2d 599, 602 (5th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 148, 112 L.Ed.2d 114 (1990); *Container Products, Inc. v. United Steelworkers*, 873 F.2d 818, 820 (5th Cir. 1989). *We have stated that* "[w]here the arbitrator exceeds the express limitations of his contractual mandate, *judicial deference is at an end. Delta Queen*, 889 F.2d at 602. The crucial issue in

> this case is whether the arbitrator had jurisdiction to hear Smith's grievance. [Emphasis added.]

The court below freely substituted its interpretation of the collective bargaining agreement for that of the arbitrator on the issue of arbitrability, ruling instead that to reconcile two conflicting contract provisions as the arbitrator was required to do here, "well-established principles of construction require that the specific trump the general provision." Pet. App. 7a.

Thus, the Fifth Circuit distinguishes between the deference due to an arbitration decision on what the Fifth Circuit sees as "the merits," and the deference due to an arbitrator's contractually empowered decision on arbitrability. Rather than limiting its review to the question of whether the arbitrator's contractual interpretation of arbitrability is "plausible" or "rationally related" to the contract, the Fifth Circuit, in conflict with other courts of appeals, requires the arbitrator's decision to accord with its own *de novo* interpretation.[2]

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[2] Respondent also errs in asserting that "it is not clear that [the arbitrator] had any theory concerning why [the] grievance was arbitrable." (Br. Op. at 9). The arbitrator stated that the first issue in the case was "[w]hether the instant grievance is arbitrable." Pet. App. 16a.

On this issue, the arbitrator weighed the employer's contention that Article 12 of the National Agreement precluded arbitration (Pet. App. 21a-22a), against the employer's contractual obligation to reinstate recovered workers compensation recipients under Article 19 of the National Agreement (Pet. App. 22a-24a) and concluded that "the Arbitrator has no choice but to sustain the grievance" (Pet. App. 24a). The arbitrator observed (Pet. App. 21a):

> There can be no serious question about the right of the Postal Service to issue a removal notice anytime within the first 90 days of a person's employment . . . without having to prove that it had "just cause. . . ." However, as the Union pointed out, Postal regulations [provide]. . . ." [w]hen the injury or disability is fully overcome within one year . . . the USPS must give an employee the right to resume employment. . . ."

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari, and in this Reply Brief, the Petition should be granted.

Respectfully submitted,

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